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STREET RAILWAYS IN COUNTRY HIGHWAYS—GRADING—ADDITIONAL BURDENS.—It is fairly well settled that street railways, whether operated by horse, cable or electric power, impose no additional servitude upon the right of way in city streets, so as to entitle the abutting lot-owners to compensation. *Reid v. Norfolk etc. R. Co.* (Va.), 26 S. E. 428, reported with annotations in 36 L. R. A. 274; *Briggs v. Lewistown etc. R. Co.*, 79 Me. 363 (1 Am. St. Rep. 316); *Limburger v. Railway Co.* (Tex.), 30 S. W. 533; *Railway Co. v. Mills* (Mich.), 48 N. W. 1007; *Halsey v. Rapid Transit Co.*, 47 N. J. Eq. 380; 2 Dillon, *Munic. Corp.* (4th ed) 722-3, 734 c (n.); Booth, *St. Ry. Law*, 83.

The extension of the system of electric cars into the country, operated over country highways, frequently connecting one city or town with another—and sometimes carrying freight and express matter as well as passengers—has given rise to new questions. In *Chicago etc. R. Co. v. Milwaukee etc. R. Co.*, 95 Wis. 561 (70 N. W. 678), it is held that the operation of such a railway, carrying freight as well as passengers, is an additional servitude, entitling the abutting proprietor, who owns the fee in the highway, to compensation.

In the recent case of *Zehren v. Milwaukee etc. Co.* (Wis), 74 N. W. 538 (March 22, 1898), the question presented was whether a street railway company, operated by electricity, along the highway of a country town, might, with the consent of the town authorities, grade the highway for the purpose of the more convenient operation of the railway, to the injury of the abutting proprietors, without compensation. It was held that although the authorities might themselves have graded the highway, without liability to the abutters for incidental damages, and although the grading improved the highway to the evident advantage of the public, yet inasmuch as the town authorities had no intention of changing the grade, and it was not demanded by public convenience, but was mainly for the pecuniary benefit of the railway company, with only incidental convenience to the public, such grading, interfering as it did with access to the abutting property, was an injury for which the abutting proprietor might claim damages. Elliott, *Roads & S.*, p. 558, n. 4.

The court went still further, and laid down the principle that the rule of law by which the operation of an electric railway in a city street is held not to be an additional servitude, is inapplicable to country highways. On this subject the court said, in part:

“There is, however, another question in the present case, which is much broader in its scope, and which is becoming a more pressing question every day; and that is the question whether passenger railroads operated by mechanical power can be laid over country highways without consent of, or compensation paid to, the adjoining land-owner; or, in other words, are they additional burdens to the fee? The development of electric railways and motors is so rapid that this question should, if possible, be settled, as the day is evidently not far distant when such passenger railways running from city to city will be numerous, and extend to all parts of the State. It is well settled that a horse railroad upon a city street, built upon grade, and for the carriage of passengers only, is not an additional burden. The drift and weight of authority in other States seem to be also that the operation of the road by electricity or other mechanical power does not change the nature of the road in this respect, although it is also held by some

other courts that, if permanent erections in the street interfering with the right of access are necessary for the operation of the road, these may constitute an additional burden. This court, however, has not passed upon these questions; and, however they may be decided, the result would not necessarily determine the status of a country road in these respects.

"That there are many and marked differences between the uses to which a city street is put and the uses to which a country highway is put cannot be denied; nor can it be denied that the uses contemplated when the land is taken vary widely, except that both are intended for purposes of travel. The street railway in its inception is a purely urban institution. It is intended to facilitate travel in and about the city, from one part of the municipality to another, and thus relieve the sidewalks of foot passengers and the roadway of vehicles. It is thus an aid to the exercise of the easement of passage; strictly, a city convenience, for use in the city, by people living or stopping therein, and fully under the control of municipal authorities, who have been endowed with ample power for that purpose. This strictly urban character of the street railways remained practically unchanged for many years, and during these years the long line of decisions grew up recognizing the street railway as merely an improved method of using the street, and rather as a help to the street than as a burden thereon. Time, however, has made changes in conditions. New motive power has been discovered, and it is found that by its use an enlarged city street car may profitably run long distances, and compete to some extent with the steam railway. It is proposed to convert the city railways into lines of passenger transportation, covering long distances, and connecting widely separated cities and villages, by using the country highways, and operating long and heavy coaches, sometimes made up into trains of several cars. Thus, the urban railway has developed into the inter-urban railway, and threatens soon to develop into the interstate railway. The small car which took up passengers at one corner, and dropped them at another, has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train which sweeps across the country from one city to another, bearing its load of passengers ticketed through, with an occasional local passenger picked up on the highway. The purely city purpose which the urban railway subserved has developed into or been supplanted by an entirely different purpose, namely, the transportation of passengers from city to city over long stretches of intervening country. When this train or car, with its load of through passengers, is passing through a country town, it is clearly serving no township purpose, save in the most limited sense. It is very difficult to say that this use of a country highway is not an additional burden. It is built and operated mainly to obtain the through travel from city to city, and only incidentally to take up a passenger in the country town. This through travel is unquestionably composed of people who otherwise would travel on the ordinary steam railroad, and would not use the highway at all. Thus, the operation of this newly-developed street railway (so-called) upon the country road is precisely opposite to the operation of the urban railway upon the city street. It burdens the road with travel which would otherwise not be there, instead of relieving it by the substitution of one vehicle for many. However we regard this development of the urban into the inter-urban railway, it seems utterly impossible and illogical to say that it is essentially the same in its purpose or effects as the mere

street railway, which was held in the *Hobart Case* not to be an additional burden on the fee. The reasons given for that holding in that case either do not apply at all, or only in a very limited degree, to the inter-urban railway. The difference is not so much in the change of motive power, but in the entirely different character of the use. Suppose a steam-railway corporation were organized to carry passengers only from city to city, and should attempt to lay its track upon the country roads without compensation, is there any doubt but that it would be held that it could not do so? We think not. Our conclusion is that an inter-urban electric railway, running upon the highways through country towns, is an additional burden upon the highway. *Pennsylvania R. Co. v. Montgomery Co. Pass. Ry. Co.*, 167 Pa. St. 62 (31 Atl. 468).

"But it is said that a distinction should be drawn between a highway in close proximity to a city, or running between the city and a neighboring suburb, and the ordinary country road through a farming district. The suggestion is not without weight. There is much difference between the practical uses in which the two highways are generally put. The suburban highway very frequently approximates closely to the city street. But, as indicated at the outset of this opinion, the difficulty in drawing any clear line of demarkation between the two is very great. If a line be drawn in one case upon the facts in that case, depending upon mere proximity, or upon the manner of use, or the density of population, or the prospect of rapid settlement, or upon all of these circumstances together, it cannot apply to any other case; and the question will always be one of doubt and embarrassment, leading to different conclusions in different courts. Such a condition of the law is to the last degree undesirable. The legislature, by chapter 175 of the Laws of 1897, has provided that such corporations may condemn lands necessary for their use, but has further provided that the act should not apply to streets in an incorporated city. In thus clothing street railway companies with the power to condemn as to all property except streets within city limits, the legislature seems to have indicated its conclusion that the city line was the proper line of demarkation and that within that line, at least, condemnation of a street was unnecessary. While this legislative idea has no binding force in determining the question of additional burden, it may justly be considered by the court which is called upon to pass upon a question beset with so much difficulty. If the line be fixed at the limits of the corporation, it will at least have the great merit of certainty, and be capable of unerring application. Presumably the city limits include the entire urban area, and we feel, under all the circumstances, that it is the true and proper line.

"We are not unmindful of the fact that the questions discussed in this opinion are vexed questions, upon which there has been much contrariety of opinion in the various courts of the country, and that the law is only in process of settlement, and must continue in that condition for years. In endeavoring to draw the line between the public right of passage, upon the one side, and the rights of the private owner, on the other, great care is manifestly needful that neither be sacrificed nor unduly magnified at the expense of the other. We held in the case of *Chicago & N. W. Ry. v. Milwaukee R. & K. E. Co.*, 95 Wis. 561 (70 N. W. 678), that an electric railway for the carriage of passengers, freight and express matter between cities constitutes an additional burden upon the highway in a country town through which it passes. We hold in this case that an electric pas-

senger railroad upon a country highway falls under the same rule. Both holdings seem to us to be founded upon good reason as well as authority, and we believe them to be salutary and just."

CITIZENSHIP—CHINESE BORN IN UNITED STATES.—In *United States v. Wong Kim Ark*, 18 Sup. Ct. 456, the Supreme Court of the United State settles the vexed question, whether the declaration of the 14th Amendment declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," applies to Chinese born in this country, of parents who are resident here, but not subjects of the United States. Affirming the decision of the lower court, the Supreme Court holds (Fuller, C. J. and Harlan, J., dissenting) that such persons if themselves resident here are *ipso facto* citizens, and therefore not subject to the Chinese Exclusion Acts. The opinion is by Mr. Justice Gray, and is an extremely learned and voluminous one.

The eviction of a tenant of the first floor of a building is held, in *Leiferman v. Osten* (Ill.), 39 L. R. A. 156, not to be effected by moving the building to another part of the lot, but so long as he retains possession of the rooms he must pay rent.

THE intentional burning of an insured building by a mortgagor is held, in *Hocking v. Virginia F. & M. Ins. Co.* (Tenn.), 39 L. R. A. 148, to preclude any recovery by a mortgagee to whom the policy was payable "as his interest may appear."

Garnishment of money and property lawfully taken from a prisoner under arrest is held, in *Holker v. Hennessey* (Mo.), 39 L. R. A. 165, to be unlawful while such property is in the hands of the sheriff, as it is in custody of law. See Va. Code, sec. 2985.

THE fraudulent substitution of a copy for the original mortgage by the mortgagor, who had obtained permission to inspect it, and his forgery of an entry of satisfaction on the original, by means of which he procured its discharge on the records, are held, in *Luther v. Clay* (Ga.), 39 L. R. A. 95, insufficient to defeat the rights of the mortgagee, even as against a *bona fide* purchaser of the premises who relied on the records.

THE right to take and sell for debt a perpetual scholarship in a college, which was granted in consideration of a donation and entitled the donor to keep one pupil in the college free of charge, is denied, in *Cleveland Nat. Bank v. Morrow* (Tenn.), 38 L. R. A. 758, as the right to appoint the pupil is a personal privilege of the donee.